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IPR Protection by China Customs

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Report Highlights:

On July 1, 2009, the "Measures of Customs of the People's Republic of China for Implementation of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights" are scheduled for implementation. These Measures describe the process through which rights' holders can work with the General Administration of Customs to enforce intellectual property rights for goods and products entering or leaving China. This report contains an UNOFFICIAL translation of this measure.

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Executive Summary: During the executive meeting of the General Administration of Customs held on March 1, 2009, the “Measures of Customs of the People’s Republic of China for Implementation of the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights” were adopted. The measures will be implemented on July 1, 2009. These Measures describe the process through which rights’ holders can work with the General Administration of Customs to enforce intellectual property rights for goods and products entering or leaving China.

This report contains an UNOFFICIAL translation of this measure. This report was completed with the support of the Beijing Office of the U.S. Department of Commerce’s Foreign Commercial Service.

BEGIN UNOFFICIAL TRANSLATION

Order No. 183 of General Administration of Customs

Having been reviewed and adopted at the executive meeting of the General Administration of Customs, the “Measures of Customs of the People’s Republic of China for Implementation of the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights” are hereby promulgated for implementation starting from July 1, 2009. The “Measures of Customs of the People’s Republic of China for Implementation of the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights” promulgated by Order No. 114 of the General Administration of Customs on May 25, 2004 will be abolished at the same time.

Director General Sheng Guangzu

March 3, 2009

Measures of Customs of the People’s Republic of China for Implementation of the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights

Chapter I General Provisions

Article 1 With a view to effectively implementing the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights (“Regulations”), these measures (“Measures”) are hereby formulated in accordance with Customs Law of the People’s Republic of China and other laws and administrative regulations.

Article 2 For purpose of requesting customs to take measures to protect intellectual property rights (“IPR”) or processing the recordation of customs protection of IPR with the General Administration of Customs (“GAC”), a domestic IPR holder may file an application directly by itself or through an authorized domestic agent, while an overseas IPR holder should file an application through the representative office it has established or an agent it has authorized in China.

An IPR holder that has authorized an agent in China to file an application as described above shall issue a power of attorney in the specified format.

Article 3 An IPR holder and its agent (collectively “IPR holder”) requesting Customs to detain the goods suspected of infringement that are about to be exported shall file an

application with Customs for detaining such goods according to the relevant provisions hereof.

Article 4 The Consignees/consignors of import/export goods or their agents (collectively “Consignee/Consignor”) shall understand the IPR status of their import/export goods to the extent reasonable. When Customs requires declaration of the IPR status of import/export goods, Consignees/Consignors shall declare that faithfully and submit relevant supporting documents to customs within the time limit prescribed by Customs.

Article 5 If the relevant documents or evidence submitted by an IPR holder or Consignee/Consignor involve trade secrets, the IPR holder or Consignee/Consignor shall state that to customs in writing.

When providing IPR protection, customs shall protect the trade secrets of the interested parties, excluding the information that Customs shall make public according to laws.

Chapter II Recordation of IPR

Article 6 An IPR holder that applies to GAC for recordation of customs protection of IPR shall file an application with GAC, which shall cover the following content:

- (1) Name of IPR holder, registered address or nationality, mailing address, name of contact, telephone number, fax number and email address;
- (2) Name of registered trademark, category and name of commodity of approved use, pattern of the trademark, validity term of registration, transfer, change and renewal of the registered trademark; name of work, time when creation thereof is completed, category of the work, pictures of the work, transfer and change of the work; name, type, application date, transfer and change of patent right;
- (3) Name of licensee, commodities which is licensed to use and term of license;
- (4) Name, origin, customs at the place of entry/exit, importer/exporter, main characteristics and price of the goods for which the IPR holder exercises IPR legally;
- (5) Manufacturer, importer/exporter, at the place of entry/exit, main characteristics and price of the goods known to have violated IPR;

An IPR holder shall submit an application separately for each IPR to be filed. An IPR holder that applies for recordation of an international registered trademark shall submit an application separately for each category of commodity involved in the application.

Article 7 An IPR holder shall accompany the recordation application it submits to GAC with the following documents and evidence:

- (1) Copies of the personal identity card, industrial and commercial business license or other registration document of the IPR holder;
- (2) Copy of the Trademark Registration Certificate issued by the Trademark Office of the administrative department of industry and commerce of the State Council (an applicant approved to change any item of trademark registration, renew the registration of a trademark, transfer a registered trademark or apply for recordation of an registered trademark shall also submit the trademark registration certificate issued by the administrative department of industry and commerce of the State Council); copy of the certificate of voluntary registration of copyright issued by the copyright registration department and work photos certified by the copyright registration department (an applicant who has not yet made the voluntary registration of copyright shall submit a work sample that can prove that the applicant is the copyright holder and other evidence relating to copyright); copy of the patent certificate issued by the administrative

department of patent of the State Council (copy of patent register issued by the administrative department of patent of the State Council within 6 months before the applicant submits the recordation application, if more than 1 year has elapsed since the date of the patent grant notice; patent right evaluation report of the administrative department of patent of the State Council, if the application is for recordation of a patent of utility model or industrial design);

- (3) Copy of the licensing contract, if the IPR holder licenses the use of its registered trademark, work or patent, or written descriptions about the licensee, scope of license and term of license, if no licensing contract has been signed;
- (4) Photos of the goods and their packing for which the IPR holder exercises IPR legally;
- (5) Evidence of the import/export of the goods known to have violated IPR (copies of related legal instruments, if the dispute between the IPR holder and others over infringement has been settled by a people's court or department in charge of IPR);
- (6) Other documents or evidence deemed necessary by GAC.

The documents and evidence submitted to GAC by an IPR holder as specified above shall be complete, true and valid. A document and evidence in foreign language shall be accompanied by a Chinese translation. When it deems necessary, GAC may require an IPR holder to submit the deed of notarization and certification for the related documents or evidence.

Article 8 An IPR holder that applies to GAC for recordation of customs protection of IPR or reapplies to GAC for recordation after the original recordation has become invalid shall pay recordation fees into the account designated by GAC through a bank. GAC shall issue a receipt for the recordation fees collected. The charging standard for recordation fees will be separately formulated and announced by GAC together with related state department.

An IPR holder that applies for renewal or change of recordation need not pay recordation fees again.

For an IPR holder that withdraws its application for recordation before it is approved by GAC or whose application for recordation has been rejected, GAC shall refund its recordation fees. But the paid recordation fees will not be refunded if the recordation already approved by GAC is written off or cancelled by GAC or has become invalid due to other reasons.

Article 9 The recordation of customs protection of IPR will take effect from the day it is approved by GAC and remain valid for 10 years. For an IPR that has a validity term of less than 10 years starting from the day the recordation takes effect, the validity term of recordation shall be subject to the validity term of the IPR.

For the recordation approved by GAC or renewed with the approval of GAC before implementation of the Regulations, the validity term is the original validity term.

Article 10 Within 6 months before expiration of the validity term for the recordation of customs protection of IPR, an IPR holder may file a written application with GAC for renewal of the recordation and accompany it with the related documents. Within 10 working days after receipt of all renewal application documents, GAC shall make a decision on whether or not the renewal will be approved and give a written notice to the IPR holder. If the renewal is not approval, the reasons shall be given.

The validity term of a renewed recordation starts from the day immediately after the expiration day of the previous recordation and will last for 10 years. If the validity term of the IPR is less than 10 years starting from the day immediately after the expiration day of the previous recordation, the validity term of the renewed recordation is subject to the validity term of the IPR.

Article 11 In case of any change to the content of the application submitted to Customs under Article 6 hereof after the recordation of customs protection of IPR is approved by GAC, the IPR holder shall file an application with GAC for change of recordation within 30 working days after the day the change occurs and accompany the application with the relevant documents.

Article 12 If an IPR is no longer protected by laws and administrative regulations or a recorded IPR has been transferred before expiration of the validity term of recordation, the original IPR holder shall file an application with GAC for writing off the recordation of customs protection of IPR within 30 working days after the day the recorded IPR is no longer protected by laws and administrative regulations or the transfer takes effect and accompany the application with the relevant documents. An IPR holder that has given up recordation within the validity term thereof may apply to GAC for writing off the recordation.

If serious impact is caused on the legal import/export of others by failure to apply to GAC for change or write-off of recordation as specified in Article 11 and the first paragraph of this article, GAC may write off the recordation of related IPR at its own discretion or at the request of the stakeholder.

When writing off a recordation, GAC shall give a written notice to the related IPR holder and the recordation of customs protection of IPR will become invalid starting from the day it is written off by GAC.

Article 13 GAC shall give a written notice to the IPR holder if it cancels a recordation of customs protection of IPR under Article 9 of the Regulations.

GAC may refuse to accept the application for a cancelled recordation filed by an IPR holder in less than 1 year after the recordation is canceled by GAC.

Chapter III Detainment upon Request

Article 14 An IPR holder that requests detainment of goods suspected of infringement after finding that the goods are about to be imported/exported shall submit an application with Customs at the import/export place of the goods according to Article 13 of the Regulations. If the relevant IPR is not recorded with GAC, the IPR holder shall accompany the application with the documents and evidence specified in Article 7 (1) and (2).

An IPR holder that requests Customs to detain the goods suspected of infringement shall submit to Customs evidence that are sufficient to prove the obvious existence of infringement facts. The evidence submitted by the IPR holder shall be able to prove the following facts:

- (1) The goods that is requested Customs to detain are about to be imported/exported;
- (2) A trademark or work that violates its right to the exclusive use of trademark has been used or its patent has been implemented on the goods without authorization.

Article 15 An IPR holder that requests Customs to detain the goods suspected of infringement shall submit to Customs guaranty equal to the value of the goods within the time limit prescribed by Customs.

Article 16 If the IPR holder files an application that deviates from Article 14 hereof or fails to provide guaranty according to Article 15 hereof, Customs shall reject its application and give a written notice to the IPR holder.

Article 17 Customs that have detained the goods suspected of infringement shall give a written notice to the IPR holder that covers the name, quantity and value of the goods, name of Consignee/ Consignor, declared date of import/export and date of detainment by Customs.

Subject to approval of Customs, the IPR holder may inspect the goods detained by Customs.

Article 18 Customs shall offer assistance if a written notice is received from a people's court about assistance in detaining the related goods within 20 working days starting from the day the goods suspected of infringement are detained; if no notice about assistance in detainment is received from a people's court or the IPR holder requires Customs to release the related goods, Customs shall release the goods.

Article 19 After detaining the goods suspected of infringement, Customs shall send the detainment voucher to the Consignee/Consignor.

Subject to the approval of Customs, the Consignee/Consignor may inspect the goods detained by Customs.

Article 20 A Consignee/Consignor that requests release of its goods suspected of violating patent right from detainment under Article 19 of the Regulations shall file a written application with Customs and provide guaranty bond equal to the value of the goods.

If the request of a Consignee/Consignor for release of its goods suspected of violating patent right from detainment meets the above regulation, Customs shall release the goods and give a written notice to the IPR holder.

An IPR holder that brings a lawsuit before a people's court about the dispute over patent infringement shall submit to Customs a copy of the notice issued by the people's court about case acceptance within 30 working days after service of the written notice of Customs specified above.

Chapter IV Ex-officio Investigation and Disposal

Article 21 Customs exercises supervision over import/export goods and may require a Consignee/Consignor to declare the IPR status of the goods and submit relevant supporting documents within a prescribed time limit if it is found that the import/export goods involve an IPR recorded with GAC and the use of the relevant IPR by the importer/exporter or manufacturer is not recorded with GAC.

If the Consignee/Consignor fails to declare the IPR status of the goods and submit relevant supporting documents as specified above or Customs have reasons to believe that the goods are suspected of infringing upon the IPR recorded with GAC, Customs shall terminate release of the goods and give a written notice to the IPR holder.

Article 22 Within 3 working days starting from day the written notice to Customs is served under Article 21 hereof, the IPR holder shall respond as follows:

- (1) If it believes that the related goods have infringed upon its IPR recorded with GAC and requires Customs to detain the goods, the IPR holder shall file a written application with Customs for detaining the goods suspected of infringement and provide guaranty under Article 23 or 24 hereof;
- (2) If it believes that the related goods do not infringe upon its IPR recorded with GAC or does not require Customs to detain the goods suspected of infringement, it shall explain the reasons to Customs in writing.

Subject to the approval of Customs, the IPR holder may inspect the related goods.

Article 23 An IPR holder that requests Customs to detain the goods suspected of infringement under Article 22 (1) hereof shall provide Customs with:

- (1) a guaranty equal to the value of the goods, if the goods are worth less than RMB 20,000 yuan;

- (2) a guaranty equal to 50% of the value of the goods, but no less than RMB 20,000 yuan, if the goods are worth RMB 20000 ~ 200,000 yuan;
- (3) a guaranty of RMB 100,000 yuan, if the goods are worth more than RMB 20000 ~ 200,000 yuan.

An IPR holder that requests Customs to detain the goods suspected of violating its exclusive right to the use of trademark under Article 22 (1) hereof may provide a blanket guaranty for GAC under Article 24 hereof.

Article 24 Subject to GAC approval, an IPR holder that has its exclusive right to the use of trademark recorded with GAC may submit to GAC a letter of guaranty issued by a bank or a non-bank financial institution and provide a blanket guaranty for Customs protection measures it requests for its exclusive right to the use of trademark.

The amount of the blanket guaranty shall be equal to the sum of the storage, safekeeping and disposal expenses incurred after the IPR holder applied for detainment of the goods suspected of infringement in the previous year, or RMB 200,000 yuan, if the IPR holder did not apply to Customs for detainment of goods suspected of infringement in the previous year, or the storage, safekeeping and disposal expenses are less than RMB 200,000 yuan.

From the day the use of the blanket guaranty is approved by GAC to December 31 of the year, an IPR holder that requests Customs to detain the import/export goods suspected of violating the exclusive right to the use of trademark it has recorded with GAC under Article 16 of the Regulations need not provide a separate guaranty, unless GAC has issued a notice to the guarantor for fulfillment of guaranty responsibility to address the failure of the IPR holder to pay the related expenses under Article 25 of the Regulations or bear compensation responsibility under Article 29 of the Regulations.

Article 25 If an IPR holder has filed an application under Article 22 (1) hereof and provided guaranty under Article 23 and 24 hereof, Customs shall detain the goods suspected of infringement and give a written notice to the IPR holder. If the IPR holder has neither filed an application nor provided guaranty, Customs shall release the goods.

Article 26 For the goods suspected of infringement have been detained, Customs shall send a detainment voucher of the goods to the Consignee/Consignor.

Subject to the approval of Customs, the Consignee/Consignor may inspect the goods detained by Customs.

Article 27 After detaining the goods suspected of infringement, Customs shall investigate the goods and other related conditions according to law. The Consignee/Consignor and the IPR holder shall cooperate with Customs in the investigation and provide the relevant details and evidence faithfully.

In the investigation into the goods suspected of infringement, Customs may request the department in charge of IPR to offer advisory opinions.

If the IPR holder and the Consignee/Consignor have reached an agreement on the goods suspected of infringement that have been detained by Customs and submitted a written application to Customs along with the agreement, requesting Customs to lift the detainment, Customs may terminate the investigation unless they believe the goods are suspected of constituting a crime.

Article 28 If Customs cannot decide whether the goods suspected of infringement have indeed infringed upon the relevant IPR after investigating the detained goods, they shall give a written notice to the Consignee/Consignor within 30 working days starting from the day the goods suspected of infringement are detained.

If Customs cannot decide whether the goods have infringed upon the relevant patent right, the Consignee/Consignor may request that Customs to release the goods after providing with a guaranty equal to the value thereof. If Customs agrees to release the goods, the second and third paragraphs of Article 20 shall apply.

Article 29 If Customs cannot decide whether the relevant goods have infringed upon its IPR, an IPR holder may apply to a people's court for measures of ordering the stop of the infringement or preserving the property under Article 23 of the Regulations.

Customs shall offer assistance if a written notice is received from a people's court about assistance in detaining the related goods within 50 working days starting from the day the goods suspected of infringement are detained; if no notice about assistance in detainment is received from a people's court or the IPR holder requires Customs to release the related goods, Customs shall release the goods.

Article 30 When deciding to forfeit the infringing goods, Customs shall give a written notice to the IPR holder about the following known facts:

- (1) Name and quantity of the infringing goods;
- (2) Name of Consignee/Consignor;
- (3) Declared date of import/export of infringing goods, date of detainment by Customs and date when the punishment decision takes effect;
- (4) Source and destination of the infringing goods;
- (5) Other facts that Customs can provide in relation to the infringing goods.

Customs shall offer assistance if a people's court or the department in charge of IPR needs such assistance in retrieving the evidence related to the import/export goods while settling the dispute between the interested parties over the infringement.

Article 31 Customs shall detain the articles that are found to be carried or mailed into/out of China by persons and suspected of violating the IPR specified in Article 2 of the Regulations or have exceeded the reasonable quantity for personal use, unless the passenger or recipient/sender has declared abandonment thereof to Customs and Customs has granted approval.

IPR holders shall cooperate with Customs in investigating the infringing articles. An inbound/outbound passenger or a recipient/sender of inbound/outbound mails who does not believe that the article detained by Customs has violated the related IPR or claims that it is for personal use may explain the related conditions to Customs in writing and provide relevant evidence.

Article 32 Those import/export goods or inbound/outbound articles that are found by Customs to have infringed upon IPR after investigations shall be forfeited by Customs under the first paragraph of Article 27 and Article 28 of the Regulations. But, those goods that the interested parties cannot verify may be taken over by Customs 3 months after the day Customs have made the relevant announcement.

Those with infringing acts in import/export suspected of crime shall be turned over by Customs to the department of public security.

Chapter V Disposal of Goods and Expenses

Article 33 Customs shall dispose of the forfeited infringing goods as follows:

- (1) The goods that can be used directly for social public welfare programs or an IPR holder intends to purchase will be turned over to the related public welfare institution or transferred to the IPR holder on a paid basis;
- (2) The goods that cannot be disposed of as specified in Item (1) above, but have infringing characteristics that can be removed will be auctioned according to law after the infringing characteristics have been removed. The proceeds from the auction shall be turned over to the State Treasury;
- (3) The goods that cannot be disposed of as specified in Items (1) and (2) above shall be destroyed.

Customs shall first solicit the opinion of the related IPR holder before auctioning the infringing goods. When Customs destroys the infringing goods, the IPR holder shall provide the necessary assistance. Customs shall exercise the necessary supervision when the related public welfare institution uses the infringing goods forfeited by Customs for any social public welfare program and when the IPR holder destroys the infringing goods as authorized by Customs.

Article 34 If Customs assists a people's court in detaining the goods suspected of infringement or release the detained goods, the IPR holder shall pay the storage, safekeeping and disposal expenses incurred by the goods during detainment by Customs.

For the infringing goods forfeited by Customs, the IPR holder shall pay the storage, safekeeping and disposal expenses on the basis of the actual duration of detainment by Customs. But, if Customs cannot complete the disposal of the goods within 3 months after the day the decision on forfeiting the infringing goods is served on the Consignee/Consignor, which is not caused by Consignee/Consignor's application for administrative reconsideration and act of bringing an administrative lawsuit or other special reasons in respect of the disposal thereof, the IPR holder need not pay the expenses after the 3 months.

If Customs auction the infringing goods under Article 33 (2), the payment of auction expenses shall be subject to the relevant regulations.

Article 35 If the IPR holder fails to pay the relevant expenses as required by Article 34 hereof, Customs may deduct the relevant expenses from the guaranty bond provided by the IPR holder or require the guarantor to fulfill the guaranty obligations.

In the case of forfeited infringing goods, Customs shall clear off the relevant expenses after disposal thereof and then refund the guaranty bond to the IPR holder or relieve the guarantor of guaranty responsibility.

If Customs assist a people's court in detaining the goods suspected of infringement or releasing the detained goods under Article 24 (1), (2) and (4) of the Regulations, the Consignee/Consignor may apply to the people's court for preservation of property against the guaranty provided by the IPR holder. If Customs does not receive a notice from the people's court about assistance in implementing property preservation measures against the guaranty provided by the IPR holder within 20 working days starting from the day Customs assist the people's court in detaining the goods suspected of infringement or releasing the detained goods, Customs shall refund the guaranty bond to the IPR holder or relieve the guarantor of guaranty responsibility. If a notice is received from the people's court about assistance in implementation, Customs shall assist in the implementation.

Article 36 If the IPR holder submits to Customs a copy of the notice of the people's court about case acceptance under the third paragraph of Article 20 hereof after Customs has released the detained goods suspected of patent right infringement under Article 19 of the Regulations, Customs shall dispose of the guaranty bond provided by the Consignee/Consignor according to the judgment of the people's court; if the IPR holder does not submit the copy, Customs shall refund the guaranty bond provided by the

Consignee/Consignor. The Consignee/Consignor may apply to the people's court for property preservation against the guaranty provided by the IPR holder for Customs. If Customs do not receive a notice from the people's court about assistance in implementing property preservation measures against the guaranty provided by the IPR holder, Customs shall refund the guaranty bond to the IPR holder or relieve the guarantor of guaranty responsibility within 20 working days starting from the day the guaranty bond provided by the Consignee/Consignor is disposed of. If a notice is received from the people's court about assistance in implementation, Customs shall assist in the implementation.

Chapter VI Supplementary Provisions

Article 37 Customs shall protect Olympic Symbol and the World Expo logo marks by using these Measures for reference.

Article 38 "Guaranty" mentioned herein means guaranty bond and the letter of guaranty issued by a bank or a non-bank financial institution.

Article 39 In these Measures, the value of goods is fixed by Customs on the basis of the transaction price of the goods or estimated by Customs according to law, if the transaction price cannot be determined.

Article 40 The written notice of customs specified in Articles 17, 21 and 28 hereof may be served through direct mailing, fax or other methods.

Article 41 The time limit specified in the third paragraph of Article 20 and the first paragraph of Article 22 starts from the day immediately after the day the written notice of Customs is served. The close of the time limit is determined as follows:

- (1) If the IPR holder delivers documents to or provides guaranty for Customs via a post office or a bank, the close is the 24th hour on the expiration day of the time limit;
- (2) If the IPR holder delivers documents to or provides guaranty for Customs by hand, the close is when the normal office hours of Customs end on the expiration day of the time limit.

Article 42 A IPR holder and Consignee/Consignor shall check the copies of the relevant documents they submit to Customs hereunder against the originals thereof and shall mark the copies with the wordings "Correct Copy of the Original" after the check and affix their signatures thereto by way of confirmation.

Article 43 These Measures are implemented as from July 1, 2009. The "Measures of Customs of the People's Republic of China for Implementation of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights" promulgated by GAC through Order No. 114 on May 25, 2004 will be abolished at the same time.